

FILED

SEP 09 2016

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
MISSOURI RIVER ABOVE HOLTER DAM BASIN (41I)

CLAIMANT: Northwestern Corporation

CASE 41I-639

41I 94348-00

OBJECTORS: Northwestern Corporation;
United States of America (Bureau of Reclamation);
State of Montana Attorney General

41I 94349-00

**ORDER DENYING MOTIONS TO AMEND,
ORDER JOINING ATTORNEY GENERAL, AND
ORDER SETTING SCHEDULING CONFERENCE**

I. INTRODUCTION

This case involves two water rights owned by Northwestern Corporation (Northwestern) for use in connection with Holter Dam and Lake.

Claim 41I 94348-00 was filed as a direct flow power generation right with a flow rate of 7,100 CFS and a volume of 5,183,000 acre feet per year (AFY). Claim 41I 94348-00 received the following two issue remarks:

THE CLAIMED VOLUME EXCEEDS MAXIMUM FEASIBLE VOLUME. BASED ON THE FLOW RATE AND PERIOD OF USE, THE MAXIMUM VOLUME POSSIBLE IS 154,248.00 ACRE-FEET PER YEAR.

THE USE OF THIS WATER APPEARS TO BE LARGELY NON-CONSUMPTIVE.

Montana Power Company filed an objection to the point of diversion and place of use for this right.¹ No other parties objected to this claim.

¹ Northwestern Corporation is Montana Power Company's successor in interest. Montana Power Company's objection has been assumed by Northwestern Corporation.

Claim 41I 94349-00 was filed for storage in Holter Lake. The claimed flow rate was 41,300 CFS and the volume claimed was "the amount necessary to fill the storage reservoir at any time." (Continuation worksheet attached to original Statement of Claim.)

Claim 41I 94349-00 received the following issue remarks:

IT IS UNCLEAR WHETHER A FLOW RATE IS NEEDED TO ADEQUATELY
ADMINISTER THIS WATER RIGHT.

THE USE OF THIS WATER APPEARS TO BE LARGELY NON-CONSUMPTIVE.

NO VOLUME HAS BEEN CLAIMED.

Montana Power Company objected to this right on a number of grounds, including volume. The United States Bureau of Reclamation (BOR) also objected. The BOR's objection stated "[t]he Bureau of Reclamation believes that this water right can be better described by decreeing a volume rather than a flow rate." BOR Objection at 2 (January 4, 1996).

The Water Court ordered the claimant to meet with the DNRC to address and attempt to resolve the issue remarks on these claims. The Court also ordered the DNRC to file a report containing its recommendations regarding resolution of those issue remarks.

Northwestern filed a motion to amend claim 41I 94348-00. This motion asks that the volume for this right be amended to 5,154,248 AFY. A motion to amend was also filed for claim 41I 94349-00. This motion seeks a place of use that includes power generation facilities at Holter, Black Eagle, Rainbow, Cochrane, Ryan and Morony. The motion also seeks elimination of a flow rate for this right and recognition of a volume of 313,636 AFY.

The DNRC issued a report on both claims. It recommended accepting a volume of 5,154,248 AFY for claim 41I 94348-00 and removal of the issue remarks for this right.

For claim 41I 94349-00, the DNRC recommended eliminating the flow rate, accepting a volume of 313,636 AFY, and addition of a clarifying remark stating that this claim is used at Black Eagle, Rainbow, Ryan, Cochrane and Morony.

Both the BOR and Northwestern filed responses to the DNRC's report and recommendations. These responses indicated that acceptance of the DNRC's recommendations and Northwestern's motions to amend would resolve the objections of both parties.

II. STATEMENT OF THE ISSUES

1. Should Northwestern's motions to amend its water rights be granted?
2. Does the information supplied by Northwestern adequately address the issue remarks attached to its claims?

III. ANALYSIS

The Legislature determined "that it is in the state's best interest to ensure that valid issues raised as a result of claims examination...are resolved before a final decree is issued." § 85-2-247(1), MCA. Issue remarks can be resolved through the objection process or through direct involvement of the Water Court and the DNRC. § 85-2-248, MCA.

Northwestern has the burden of proving that its motions to amend should be granted.

The effect of a motion to amend a statement of claim is simply that it is judged against the original claim to determine if sufficient evidence supports the requested amendment. W. R. Adj. R. 19 states that the original filed claim is *prima facie* proof of the elements of the claim, and even a claimant's objection to her own claim must be proven by a preponderance of the evidence to overcome this *prima facie* proof.

Nelson v. Brooks, 2014 MT 120, ¶ 34, 375 Mont. 86, 329 P.3d 558 (emphasis omitted).

1. Should Northwestern's motions to amend its water rights be granted?

41I 94348-00

This claim is a direct flow right for delivery of water through turbines at Holter Dam. The issue remark for this right noted that the claimed volume exceeded the amount possible given the claimed flow rate and period of use.

Volume is determined by multiplying flow rate by the time the claimed flow rate is diverted. There is a discrepancy between the volume in the issue remark and the

volume in the DNRC report. The issue remark identified a volume of 154,248 AFY, while the DNRC report identifies a maximum feasible volume of 5,154,248 AFY. Notes in the claim file indicate the volume calculated by the DNRC during claims examination was 5,154,248 AFY, and that the first digit was omitted from the volume identified on the issue remark, thereby causing a typographical error. The DNRC's calculations appeared to be based on the assumption that Northwestern's turbines have historically run all year at a flow rate of 7,100 CFS.

Northwestern's amendment requested modification of its volume to 5,124,248 AFY. Northwestern did not supply evidence to support its amendment. There was no evidence that this volume had historically been run through the turbines at Holter Dam, and no evidence that the capacity of the turbines has remained the same from the inception of the right. In the absence of such evidence, Northwestern has not met the standard applicable to claimants seeking to modify their claims.

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This claim is for storage of water in Holter Lake. The amendment proposed by Northwestern asserts that water stored in Holter Lake is also used for power at other downstream facilities including Black Eagle, Rainbow, Cochrane, Ryan and Morony. Northwestern requested that these facilities be added to the place of use for this claim. It also requested a volume of 313,636 AFY based on impoundment of that amount in 1936. The priority date claimed for this right is April 30, 1918.

Northwestern's amendment does not indicate whether its hydropower facilities at Black Eagle, Rainbow, Cochrane, Ryan and Morony were constructed before or after Holter Lake was created. Northwestern's amendment does not state when water from Holter Lake was first used to generate hydropower at Black Eagle, Rainbow, Cochrane, Ryan and Morony. It is also unclear whether these facilities were initially owned by Montana Power Company or by other entities later acquired by Montana Power Company. These questions raise issues about when storage water from Holter was first used in these facilities.

The DNRC recommended eliminating the 7,100 CFS flow rate for this claim. It also recommended accepting the proposed volume of 313,636 AFY, and adding downstream power generation facilities to the place of use for this right. The DNRC's recommendations were not supported by evidence of actual historical use.

The motion to amend claim 41I 94349-00 for storage water in Holter Lake also lacks historical support. Although Northwestern supplied evidence that 313,636 acre feet was stored in Holter, this amount was not impounded until 1936, and there was no evidence that this amount of water, once impounded, was later used beneficially.

The gap in time between the priority date and impoundment of the volume requested by the claimant raises questions about perfection of this water right. There are also potential questions about abandonment of a portion of the requested volume between 1936 and the present if the maximum volume has not been reached since 1936.

Northwestern also asks that the flow rate initially claimed for this right be eliminated, and that no flow rate be decreed. This effectively allows the claimant to divert water irrespective of actual historical use. Moreover, removal of a flow rate for Northwestern's right raises concerns about administration of its right in conjunction with other water rights on the Missouri River.

Finally, Northwestern seeks to amend the place of use for claim 41I 94349-00 by adding downstream power generation facilities. Its motion is not supported by evidence showing when those power generation facilities were built, or when water was released from Holter to supply those facilities.

In summary, Northwestern has not met the standard required to amend either of its claims.

2. Does the information supplied by Northwestern adequately address the issue remarks attached to its claims?

As with Northwestern's motions to amend, there is little evidence available to enable resolution of issue remarks attached to its claims. Both the DNRC and Northwestern have recommended establishing a volume for claim 41I 94348-00 that is based on the maximum possible annual diversion rather than historical beneficial use. A

bedrock principle of Montana water law is that the extent of a claim depends on actual beneficial use. Northwestern's response to the volume issue remark does not contain any information indicating what amount of water its predecessors actually used and when such use occurred. Without this information, it is not possible to determine the extent of the water right perfected by Montana Power Company.

The issue remarks pertaining to volume give rise to issues regarding perfection of claim 41I 94349-00. Diversion records supplied by Northwestern to address the volume issue remark show that the volume it is requesting was not actually diverted until years after the claimed priority date. The gap between priority date and actual beneficial use raises questions about whether the claimant was diligent about perfection of its water right. There is also no evidence that the water allegedly impounded by Montana Power Company was used for power generation.

The claimant has requested that downstream power generation facilities be added to the place of use for this right so that storage water from Holter Lake can be used in these facilities. Again, however, there was no information supplied to support these requested changes, and therefore no basis for concluding that a water right for storage was perfected for use at downstream facilities.

Montana statutes describe the process used to address unresolved issue remarks involving nonperfection or abandonment of a water right. Section 85-2-248(7)(a), MCA provides: "If an unresolved issue remark involves nonperfection or abandonment, the water court shall join the state of Montana through the attorney general as a necessary party to resolve the issue remark. The water court shall notify the attorney general of the joinder."

In accordance with Section 85-2-248(7)(a), MCA, the Water Court is joining the Montana Attorney General as a party. The purpose of this joinder is to assist the Court with resolution of the issue remarks attached to these claims.

IV. CONCLUSION

1. Northwestern's motions to amend its water rights are not supported by sufficient evidence and should therefore be denied.

2. The information supplied by Northwestern does not adequately address the issue remarks attached to its claims, and does not allow those remarks to be resolved.

V. ORDER

Northwestern's motions to amend claims 41I 94348-00 and 41I 94349-00 are denied.

The issue remarks on the above captioned claims are not resolved and will remain in place.

The Montana Attorney General is joined as a party to this case.

ORDERED that a scheduling conference will be held by telephone on **October 5, 2016 at 10:00 AM**. The instructions for accessing the call are as follows:

1. At the designated conference time dial the toll free telephone number:
1-877-526-1243
2. At the prompt, enter the participant pin code followed by the pound (#) key:
7685196#.
3. At the prompt state your name followed by the pound (#) key.

If you have any questions or if you experience problems placing this call you may contact the Water Court at 1-800-624-3270 (in state) or (406) 586-4364.

DATED this 9th day of September, 2016.


Russ McElyea
Chief Water Judge

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